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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-699

ABBOTT LABORATORIES, a corporation,
HERBERT M. GROSS, CLARENCE J. ENDICOTT,
ROBERT T. O'DONNELL, ROBERT H. OTTO,
and HARRY W. HOWELL,
individuals, Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ABBOTT LABORATORIES, a corporation, HERBERT M. GROSS, CLARENCE J. ENDICOTT, ROBERT T. O'DONNELL, ROBERT H. OTTO, and HARRY W. HOWELL,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners Abbott Laboratories, Herbert M. Gross, Clarence J. Endicott, Robert T. O'Donnell, Robert H. Otto, and Harry W. Howell respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 2, 1974.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reproduced in Appendix A and is cited as "C.A.Op.A —". The order of the court of appeals denying a petition for rehearing en banc and revising pages 15, 19 and 20 of the opinion, is reproduced in Appendix B and is cited as "C.A.Op.B". The opinion of the district court, 369 F.Supp. 1396 (E.D.N.C. 1973), is reproduced in Appendix C and is

cited as "D.C. Op. ". The joint appendix in the court of appeals is cited as "J.A. "

JURISDICTION

The judgment of the court of appeals for the fourth circuit was entered on October 2, 1974. A timely petition for rehearing en banc was denied on November 5, 1974, and revised pages 15, 19 and 20 of the court's opinion were also filed on that date. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the district court finds that publicity deliberately and solely generated by federal prosecutors creates an inherently suspect trial situation, and the court of appeals agrees that the publicity would have a substantial adverse effect on the impartiality of potential jurors, is the trial court clearly erroneous in exercising its discretion to dismiss the indictment under the rule of *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Turner* v. *Louisiana*, 379 U.S. 466 (1965) and *Estes* v. *Texas*, 381 U.S. 532 (1965)?

2. Where the district court finds that nationwide and recurring prejudicial publicity, deliberately and solely generated by federal prosecutors, created an inherently suspect trial situation, must the defendants waive their constitutional rights by requesting a change of venue or continuance, or both, as a prerequisite to dismissal, notwithstanding the Sixth Amendment and this Court's decision in *Barker* v. *Wingo*, 407 U.S. 514 (1972)?

3. Where the district court finds that the special prosecutor deliberately created grand jury bias and prejudice, is it an abuse of discretion for the court to dismiss the indictment?

4. Should not this Court by a review of this case exercise its power of supervision over federal prosecutors whose conduct violated the rules of the district court, the rules of the Department of Justice and the American Bar Association Code of Professional Responsibility, where the court of appeals expressed the "strongest disapproval" of the misconduct and the district court ordered dismissal as the only remedy adequate to protect the rights of the defendants?

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND CANONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

§ 502 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 352, provides:

> "A drug . . . shall be deemed to be misbranded —
>
> . . .
>
> (j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof."

Rule 1.1 of the Rules of the United States District Court for the Eastern District of North Carolina provides:

> "The ethical standards relating to the practice of law in this court shall be the canons of professional ethics of the American Bar Association, now in force, and as hereafter modified or supplemented. . . ."

The American Bar Association Code of Professional Responsibility, DR7-107(B), provides:

> "Trial Publicity
>
> . . .
>
> A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
>
> . . .
>
> (6) Any opinion as to the guilt or innocence of the accused, the evidence, or merits of the case."

The Rules of the Department of Justice, 28 C.F.R. § 50.2(b), provide:

> "(2) At no time . . . shall personnel of the Department furnish any statement or information which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.
>
> "(3) . . . Disclosures should include only incontrovertible, factual matters. . . . In addition, where . . . information relating to the . . . investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.
>
> "(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:
>
> . . .

"(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

"(vi) Any opinion as to the accused's guilt. . . ."

STATEMENT OF THE CASE

A. The Indictment

On May 29, 1973, a federal grand jury in Raleigh, North Carolina, returned the indictment in this case, charging Abbott Laboratories and five individuals with 60 misdemeanors arising out of some 30 shipments of intravenous solutions in interstate commerce. The indictment charged that the intravenous solutions were misbranded and adulterated within the meaning of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 *et seq.*

The corporate defendant and the five individual defendants entered pleas of not guilty. The defendants also filed two motions to dismiss based on the misconduct of the federal prosecutors in generating massive prejudicial post-indictment publicity, and in presenting the case to the grand jury. The district court granted both motions and the court of appeals reversed both rulings.

This petition raises the question of the remedy applicable when the trial court finds that the misconduct of the federal prosecutors was (1) sole cause of an inherently prejudicial situation, and (2) created bias and prejudice in the grand jury.

B. The Motion Based on Prejudicial Publicity Generated Solely by the Prosecutors

This motion is concerned solely with publicity deliberately generated by the misconduct of the federal prosecutors which precludes a fair trial. It does *not* involve overreaching by the press, or publicity generated by defendants.

The United States Attorney invited a television reporter and camera crew to his office for an interview within a few hours after the indictment was returned. During the course of the interview, the television reporter asked if any deaths or illnesses were attributed to the drugs. A special prosecutor from the Department of Justice in Washington, who had previously advised the United States Attorney that if the question of deaths came up "you better fudge it" (J.A. 688a), answered the question in the affirmative, saying that "The Center for Disease Control in Atlanta previously reported that nine deaths occurred in 1971." (D.C.Op.C 5). This nine death story was reported that same evening on WRAL-TV, which covers the district in which the case arose. Other nine death stories, attributable to Department of Justice sources in Washington (C.A.Op.A 8), were reported extensively in newspapers throughout the country and on television and radio stations, including the Tobacco Network, a group of 70 stations across North Carolina.

On that same afternoon, the United States Food and Drug Administration (FDA) issued a press release which had previously been prepared by two FDA attorneys, assisted by a public relations officer. The release included these conclusions:

> ". . . Five present or former officials of the Company also were named in the indictment for interstate shipment of intravenous drugs that were unsterile and dangerous to the public health. . . .
>
> "The Center for Disease Control, Atlanta, Georgia, reported 50 deaths from 412 patient episodes during late 1970 and early 1971 from septicemias (blood poisonings) which CDC determined to be associated with the use of contaminated Abbott intravenous solutions."
>
> ". . . These individuals held positions of responsibility with respect to the adulteration and misbranding for the intravenous drugs named in the Indictment. . . ." (J.A. 128a-129a).

The 50 death story received even more extensive newspaper, television and radio coverage throughout the nation than the nine death story. It was disseminated by UPI, AP, NBC, CBS and ABC. The sensational nature of the news resulted in front page articles and headlines in many newspapers.

Defendants filed a motion to dismiss, alleging that this prejudicial pretrial publicity intentionally and solely generated by the prosecutors so infected the community that defendants could not receive a fair trial under the doctrine announced by this Court in *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Estes* v. *Texas*, 381 U.S. 532 (1965) and *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966). After three days of hearings at which all of the government attorneys and the FDA's public relations officer appeared at length, the district court exercised its discretion to dismiss. The court held that the improper publicity generated solely by the prosecutors had so infected the community that voir dire could not adequately protect the defendants, citing, *inter alia*, this Court's opinions in *Rideau*, *Estes*, *Sheppard* and *Groppi* v. *Wisconsin*, 400 U.S. 505 (1971). The court also held that voir dire was inadequate because of the recurring nature of the publicity, citing the fact that the 50 death story appeared in three eastern North Carolina newspapers even at the relatively insignificant time of the arraignment. (D.C.Op.C 14-15).

The court further held that a continuance would not remedy the situation, following the balancing test of this Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), and that a change of venue would be a useless gesture because of the nationwide publicity as evidenced by the 225 newspaper articles and transcripts of numerous network and local television and radio news reports referring to the government's nine and 50 death releases. Therefore, dismissal was the "only appropriate remedy." (D.C.Op.C 15-16)

The court of appeals reversed, distinguishing *Rideau* on the ground that in its opinion the publicity in the instant case was "not as devastating." (C.A.Op.A 10). The court ruled that defendants must demonstrate actual prejudice, although the court also said that the prejudicial publicity "could unquestionably be expected to have a substantial adverse effect on the impartiality" of potential jurors. (C.A.Op.A 8).

C. The Motion Based on the Prosecutors' Misconduct in Presenting the Case to the Grand Jury

Defendants also filed a second motion to dismiss, based on prosecutorial misconduct in presenting the case to the grand jury. This motion was based primarily on three "questions" posed by one of the special prosecutors to Robert O'Donnell, one of the defendants in this case, and formerly director of quality control for Abbott Laboratories. The "questions" were:

> "Q. My recollection is, and I think that you can help me with that, they had a couple of dead bodies in Denver from Abbott I.V. solutions, isn't that right?" (Grand Jury Transcript, page 187).
>
> . . .
>
> "Q. Let's see now if we can refresh your recollection with exactly what was at the Henry Ford Hospital in Detroit. I want to show you a photocopy of what is captioned the Detroit Newspaper of March 14, 1971, with the headline that says: Faulty Bottle Caps Blamed in Nine Deaths, the Detroit Free Press of March 16, 1971, Eight Hospital Deaths tied to Tainted Bottle Caps, March 16, 1971, from the Detroit News: Hospital Blood Poison Deaths were linked to Water, and the Detroit News of March 17, Identities of Tainted Fluid Victims Withheld. Let me see if this will help you refresh your recollection about Henry Ford Hospital in Detroit?" (Grand Jury Transcript, pages 187-188).

"Q. Did she tell you the Detroit News were crazy as bed bugs that there was these dead bodies in Detroit from using Abbott I.V. Solutions." (Grand Jury Transcript, page 190).

After hearing at length from the prosecutor who posed the "questions," and reviewing the entire grand jury transcript, the district court also granted this motion to dismiss, holding "as a fact that bias and prejudice were created." (D.C.Op.C 18). The court of appeals reversed on the ground that the nine deaths and 50 deaths data were relevant. (C.A.Op.A 13).

The court of appeals denied the petition for rehearing en banc on November 5, 1974, and simultaneously filed revised pages to make the opinion conform to the charges in the indictment. (C.A.Op.B).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals will have a profound and far-reaching effect upon all future federal criminal prosecutions. The opinion asserts that voir dire can and should be used to attempt to identify the effect on the venire of prejudicial publicity generated deliberately and solely by federal prosecutors. It further imposes on defendants the duty of seeking a venue change or a continuance even though the sole reason for doing so was that the prosecutors deliberately and solely poisoned the venire by creating an inherently prejudicial circumstance. The Sixth Amendment rights of speedy trial in the venue are abridged, subordinated to the will of overzealous or unscrupulous prosecutors.

Further, the decision of the court of appeals abrogates discretionary rulings of the district court which had the effect of supervising the activities of the federal prosecutors, including their conduct before the grand jury. To allow that decision to stand would be to condone prosecutorial misconduct severely condemned by both courts below and to countenance, for the future, improper presentations

by federal prosecutors to grand juries and to the press. A ruling by this Court is essential to give prosecutors needed direction and to give defendants needed protection.

1. The District Court, Following *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), Correctly Exercised Its Discretion to Dismiss the Indictment Upon a Finding That Publicity Generated Deliberately and Solely by Federal Prosecutors Created an Inherently Prejudicial Situation.

Voir Dire

This Court has repeatedly held that where the government creates circumstances which are inherently suspect, prejudice to the accused is presumed, and the Court has refused even to consider information developed through voir dire. Voir dire is a constitutionally inadequate procedure to demonstrate the absence of such prejudice. *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

In *Rideau* this Court considered an appeal from a conviction where the defendant had been denied a change of venue in the state court. The request for a venue change was occasioned by a televised film of the defendant and a sheriff, in which the defendant confessed to the crimes for which he was later convicted. The trial court conducted voir dire, and was satisfied that the panel of jurors could judge the facts fairly. This Court reversed, declining even to examine the record of voir dire, concluding that the publicity generated with the complicity of the state's officers had fatally infected the venue, making any trial there inherently suspect. Mr. Justice Clark dissented, but said that if the case had arisen in the federal system, he would have concurred with the majority because it would then be the Court's duty, in its supervisory role, to protect the system from such misconduct.

In *Turner*, two deputies who had been assigned to tend to the jury were called as witnesses in the trial. This Court held that this activity of the state was enough to cast doubt on the fairness of the trial, and reversed. No showing of prejudicial information being actually given to the jury was made; the doubt was enough.

In *Estes*, the practice of televising court proceedings was condemned. The Court pointed out that a procedure employed by the state may involve such a probability of prejudice that it is deemed "inherently lacking in due process." Speaking for the Court, Mr. Justice Clark said:

> "This rule was followed in Rideau, supra, and in Turner v Louisiana, 379 US 466, 13 L ed 2d 424, 85 S Ct 546 (1965). In each of these cases the Court departed from the approach it charted in Stroble v California, 343 US 181, 96 L ed 872, 72 S Ct 599 (1952), and in Irvin v Dowd, 366 US 717, 6 L ed 2d 751, 81 S Ct 1639 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In Rideau and Turner the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that *prejudice was inherent* in it.
>
> "In this case it is even clearer that such a rule must be applied. In Rideau, Irvin and Stroble, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In Turner the probability of prejudice was present through the use of deputy sheriffs who were also witnesses in the case, as shepherds for the jury. *No prejudice was shown but the circumstances were held to be inherently suspect*, and, therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a

> variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in Murchison, Tumey, Rideau and Turner. *Such outward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. . . .*" 381 U.S. at 543-544 (emphasis added).

In *Sheppard*, the trial court attempted to protect the defendants against unfairness caused by a flood of publicity, but this Court reversed, quoting the *Estes* opinion for the proposition that the Constitution condemns a trial in which the state has employed procedures which create a probability that prejudice will result.

The instant case presents an even clearer situation for application of the inherently suspect doctrine for three reasons:

> (a) Each of the four cited cases arose in a state prosecution. The instant case involves the federal criminal justice system, over which this Court exercises supervision.
>
> (b) In the four cited cases, the inherently prejudicial circumstances were created either by persons who were presumably insensitive to the trial process (*Rideau*) or in trial situations in which courts conceivably could have limited the harm done (*Turner, Estes, Sheppard*). In this case, the harm caused by federal prosecutors' "conscious, deliberate" statements in violation of the rules of the court, the department and the profession (C.A. Op. A 8), was done before trial and could not have been tempered by protective procedures.
>
> (c) In the four cited cases, the sources of prejudice were the acts or omissions of state officers. In the instant case, the sources of the prejudicial publicity were the Department of Justice and FDA, widely known and trusted federal agencies that enjoy public confidence.

The court of appeals said the principles of *Rideau* did not apply because the publicity in the instant case was "not as devastating" as in *Rideau*. (C.A.Op.A 10). This rejection of the trial court's finding that the prejudicial publicity would have a substantial adverse effect upon the trial process was improper. Moreover, the court of appeals expressly agreed that the trial process was substantially affected by the prosecutors' misconduct:

> "We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory. The 'nine deaths' and 'fifty deaths' stories could unquestionably be expected to have a substantial adverse effect on the impartiality of many persons in the community from which a jury to try defendants would be drawn." (C.A.Op.A 8).

Unless the trial court's decision is clearly erroneous, its discretionary acts relating to trial prejudice should not be second-guessed by the court of appeals. *Marshall* v. *United States*, 360 U.S. 310 (1959).

The district court concluded:

> "The only appropriate remedy is dismissal. This is, of course, an extreme penalty to impose on the government. It is, however, imposed because the government, through two of its separate agencies, solely generated the prejudicial publicity. As powerful and efficient as our government is, or can be, its laws and procedures do not have to be prostituted by prejudicial publicity 'leaked' to the press in order to obtain convictions, especially criminal misdemeanor convictions." (D.C. Op.C 16).

We urge this Court to review this case, to delineate the permissible bounds of conduct of federal prosecutors, and to put a capstone on the *Rideau*, *Turner* and *Estes* line of cases.

2. The District Court, Following *Barker* v. *Wingo*, 407 U.S. 514 (1972), and Citing the Sixth Amendment, Correctly Dismissed the Indictment Upon a Finding That Prejudicial Publicity Intentionally and Solely Generated by Federal Prosecutors Precluded Fair Trial and Was Nationwide and Recurring.

Change of Venue

In addition to voir dire, the traditional remedies available to defendants to cure situations prejudicial to fair trial are change of venue and continuance. The district court found that since the nine death and 50 death stories had appeared in at least 225 newspapers, and on numerous network and local television and radio news reports, "a change of venue would be a useless gesture." The court of appeals held that a defendant who declines to waive his Sixth Amendment right to be tried in the state and district where the crime is alleged to have been committed must

> ". . . demonstrate the existence of actual prejudice far more convincingly than was done in the case at bar. A defendant who has unused means to protect his rights should not lightly be granted the extreme remedy of dismissal of the charges against him on less than a conclusive showing that the unused means would be ineffective." (C.A.Op.A 12).

The court of appeals rationale, we submit, contravenes the Sixth Amendment guarantee that defendants have a right to be tried in the state and district in which it is alleged that the crimes occurred. Surely it cannot be the law that defendants must be prepared to waive their Sixth Amendment rights before the *Rideau* doctrine is invoked, particularly where the sole trigger for the waiver is the prosecutors' misconduct. Furthermore, even the government has not suggested that there is any district in the United States which has not been subjected to the nine death and 50 death prejudicial statements.

In some instances a change of venue might be consistent with a defendant's Sixth Amendments rights—as in *Rideau* itself; but where it is inconsistent, surely the *Rideau* doctrine still applies, particularly where the offending prosecutors are federal officials. This issue alone warrants review by this court.

Continuance

This Court in *Barker* v. *Wingo*, 407 U.S. 514 (1972), adopted "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." The district court here found that "the government generated publicity is the sole justification offered for delay," and held that under *Barker* a continuance "would not only be improper but would also deny to the defendants their constitutional right to a speedy trial." The court also noted the fact that the 50 death story is now in newspaper morgues throughout the country, and would be recurring. (D.C.Op.C 16).

The court of appeals, however, held that a defendant who declines to waive his Sixth Amendment right to a speedy trial is placed under ". . . a heavy burden of proving actual prejudice resulting from the publicity as a basis for dismissal of the charges against him. . . ." (C.A.Op.A 12).

This rationale again makes the *Rideau* doctrine conditional on waiving a constitutional right. The court of appeals is saying that unless defendants waive both of their Sixth Amendment rights, *Rideau* is inapplicable and defendants must "demonstrate the existence of actual prejudice" (C.A. Op.A 12) and have a "heavy burden of proving actual prejudice." (C.A.Op.A 12).

This reasoning, we submit, is wrong. *Rideau* and its progeny do not in any way indicate that defendants must waive their Sixth Amendment rights as a prerequisite to application of the doctrine. Indeed a threshold requirement of waiver of constitutional rights would emasculate *Rideau*.

Furthermore, under *Barker*, as applied to the facts of this case, there is no justification whatsoever for suggesting that defendants have an obligation to seek a continuance.

The Sixth Amendment precludes the necessity for seeking a change of venue. *Barker* and the Sixth Amendment preclude the necessity for seeking a continuance. The *Rideau* inherently suspect situation exists. Hence the district court was correct in exercising its discretion to dismiss. The impact of the court of appeals decision on the Sixth Amendment's protections would be devastating, subordinating the rights of all defendants to the misconduct of federal prosecutors bold or careless enough to poison the trial process. This novel construction of the Sixth Amendment requires review.

3. The District Court Did Not Abuse Its Discretion in Dismissing the Indictment Upon a Finding That Grand Jury Bias and Prejudice Were Deliberately Created by a Federal Prosecutor.

Defendants' motion to dismiss based on prosecutorial misconduct before the grand jury was also granted by the district court and reversed by the court of appeals. The district court found

> ". . . as a fact that bias and prejudice were created when Mr. Epstein [a federal prosecutor] repeatedly referred to deaths and 'dead bodies,' and exhibited headlines of a newspaper story in a Detroit newspaper, which referred to deaths from Abbott I.V. solutions. Deaths were also mentioned on the day the grand jury returned the Indictment, to what extent they were mentioned is unknown because there was no transcript made of that last meeting. To raise the spector of homicide before the grand jury in an effort to obtain an indictment under an act which requires no *mens rea* is unconscionable conduct." (D.C.Op.C' 18).

The court of appeals' reversal is based on the court's opinion that evidence of deaths was relevant to the "dangerous to health" charge of the indictment under 21 U.S.C. § 352(j).

The court of appeals overlooks two factors:

First, three government attorneys declared in open court that deaths were *not* relevant to the case, even though they knew the indictment included 30 charges under 21 U.S.C. § 352(j):

(a) The United States Attorney, Mr. McNamara, said:

> ". . . [T]his Abbott indictment does not concern any deaths or illnesses, that is not a part of this case . . . ." (J.A. 330a).

(b) The general counsel of FDA, Mr. Hutt, told the trial court:

> "I am sure with Mr. McNamara, the deaths were not relevant." (J.A. 625a).

(c) The deputy chief, Consumer Affairs Section Antitrust Division, Department of Justice, Mr. Epstein, the Washington lawyer assigned to this case, said:

> "Now this nine deaths was a factual report of the number of mortalities which that branch of the Government obtained from its reporting service. I don't know if it is true fact or if it is Alice in Wonderland fantasy." (J.A. 387a).

The presumptive reason for these statements is that the government attorneys had no intention to offer any evidence that the intravenous solutions listed in the indictment caused any deaths or illnesses.

Second, even if the conclusion of the court of appeals that deaths are relevant is accepted, the inflammatory manner in which the questions were put to the grand jury witness requires dismissal. According to the district court's finding, use of words such as "dead bodies in Denver from Abbott

I.V. solutions," and "dead bodies in Detroit from using Abbott I.V. solutions" *in fact* created bias and prejudice in the grand jury. Reading inflammatory headlines to the grand jury compounded the fatal error.

The trial court exercised its discretion in granting the grand jury motion to dismiss. Reversal of this finding as "clearly erroneous" is appropriate only when there is no evidence to support the finding. *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948). The trial court made its finding after hearing at length from the prosecutors who attempted to explain their conduct. Only after three days of hearings and full briefing did the court exercise its discretion. The court of appeals should have intervened only if the finding of the district court was wholly unsupported by evidence. *United States* v. *Johnson*, 327 U.S. 106, 111-112 (1946).

4. This Court Should Review This Case and Exercise its Power of Supervision Over Federal Prosecutors Whose Conduct Violated the Rules of the District Court, the Rules of the Department of Justice and the American Bar Association Code of Professional Responsibility, Where the Court of Appeals Expressed the "Strongest Disapproval" of the Misconduct and the District Court Ordered Dismissal as the Only Remedy Adequate to Protect the Rights of the Defendants.

The misconduct of the federal prosecutors permeates this entire proceeding, from the grand jury to the post-indictment publicity. Both courts below condemned this reprehensible conduct in the strongest language. The court of appeals said:

> "We accept, without question, that the pretrial publicity in this case was prejudicial and highly inflammatory. The 'nine deaths' and 'fifty deaths' stories could unquestionably be expected to have a substantial adverse effect on the impartiality of many persons in the community from which a jury to try defendants would

> be drawn. And the case is not made easier by the fact that, even if not intentionally inflammatory, the 'fifty deaths' story appears to have been a deliberate, conscious statement by FDA, and the 'nine deaths' story a conscious, deliberate statement of the Department of Justice in Washington, although probably an inadvertent one by the prosecutors in North Carolina. Irrespective of the outcome of this case, we join in the district court's condemnation of this conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material." (C.A.Op.A 8).

The prosecutors' conduct clearly violated the rules of the United States District Court for the Eastern District of North Carolina, the rules of the Department of Justice, and the American Bar Association Code of Professional Responsibility, the applicable portions of which are quoted above on pages 3-5.

The only question is one of remedy. The district court, after reviewing the entire grand jury transcript, and after hearing from all of the prosecutors in open court for three days, concluded that the only appropriate remedy was dismissal. The court acknowledged that the remedy was extreme, but imposed it because the widespread prejudicial publicity was solely generated by the prosecutors, and traditional safeguards to fair trial would not be constitutionally adequate.

Defendants seek to protect their constitutional rights which this Court has carefully defined in *Rideau* and the cases which follow it, and in *Barker* v. *Wingo*, *supra*. In addition, in *United States* v. *Grassia*, 354 F.2d 27, 29 (2d Cir. 1963), Judge Friendly strongly suggested that dismissal can be proper for "general therapeutic purposes."

Where federal prosecutors are the sole generators of the inherently suspect circumstances, and when the entire proceeding is contaminated, beginning with the grand jury, a proper case arises for this Court to exercise its supervisory powers, whether for therapeutic purposes or otherwise.

> "When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them." *Donnelly* v. *DeChristoforo*, — U.S. —, 40 L.Ed. 2d 431, 437 (1974).

As Mr. Justice Frankfurter said in his concurring opinion in *Irvin* v. *Dowd*, 336 U.S. 717, 729-730 (1961):

> ". . . One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. . . .
>
> "Not a term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration — exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. . . ."

We know of no other case in which conscious overreaching has so permeated a judicial proceeding, beginning with the grand jury stage. The court of appeals opinion, while

expressing the strongest disapproval of the federal prosecutors' conduct, nevertheless reaches a conclusion which, if allowed to stand as precedent, will necessarily expand the opportunity for such practices to invade the fabric of the entire federal judicial system.

We urge this Court to take this opportunity to exercise its supervisory powers over the federal criminal trial process and repudiate the court of appeals' conclusion that defendants who are unwilling to waive their rights under the Sixth Amendment are to have no effective protection against an inherently prejudicial trial environment deliberately created by overreaching federal prosecutors.

CONCLUSION

For the reasons stated herein Petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

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Respectfully submitted,

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